Rajaratnam v. *Datuk Jaginder Singh & Ors.*[4] In the first case, the application for leave of the Federal Court without first applying for leave of the High Court was made on the suggestion of the Court itself which granted such leave to the appellant and proceeded to hear the appeal. In the second case, there was an application by the respondents to dismiss the appeal on three grounds. The appellant applied for amendment of the notice of appeal and memorandum of appeal to comply with the Rules seeking to overcome two of the prayers in the respondents' application. It is clear in both cases there were merits in the appeal which enabled the Court to exercise its unfettered discretion to proceed. In the present appeal however, there was no formal application and no submissions on the merits were made to us. Although in their written submission (which was never asked for) the appellants put forward certain propositions in their endeavour to show special grounds, they are intended to be in support of an extension of time to appeal under Rule 56 of the Rules of the Supreme Court 1980. An application for leave to appeal has to be properly brought before us and the respondent's counsel has to be given the opportunity of replying on the point. There must be material upon which we could exercise our discretion (see *Ratnam* v. *Cumarasamy & Anor.*[5]).

In the circumstances, we agree with the preliminary objection and hold that the appeal has not been properly brought before us.

Be that as it may, the appellants have not formally exhausted their remedies to apply for leave to appeal under the second limb of section 68(2) of the Act. Since the period of one month to appeal has lapsed, the application should now be made to the Supreme Court in compliance with Rule 56 of the Rules of the Supreme Court 1980. In the circumstances, the appeal is struck out with costs without prejudice to the appellants filing a proper application.

Order accordingly.

Solicitors: *K.P. Woon & Co.; Lewis & Co.*

TEOH SENG LIAN v. PUBLIC PROSECUTOR

[S.C. (Abdul Hamid C.J. (Malaya), Syed Agil Barakbah & Wan Hamzah S.C. JJ.) July 22 & November 4, 1985]

[Ipoh – Supreme Court Criminal Appeal No. 50 of 1984]

Criminal Law and Procedure – Charge of murder – Trial by jury – Defence of grave and sudden provocation and self-defence – Jury not told that if the exercise of right of self-defence is in excess of power given by law accused may be convicted of culpable homicide – Sudden fight – Defences not put to jury – Penal Code (Cap. 45), s. 300, Exceptions 2 & 4.

Penal Code, s. 300, Exceptions 2 & 4 – Murder – Defence of grave and sudden provocation and self-defence.

In this case the appellant was charged with murder. There had been a business misunderstanding between the appellant and the husband of the deceased. The defence evidence showed that when the appellant asked for a loan of money from the deceased she refused, scolded and chased him, hitting him with a broom and then throwing a knife at him. The knife missed him and fell to the ground. Both went for the knife but the appellant gained possession of it and slashed her. When she fell on the ground, he picked a stone and hit her on the head. At the trial with a jury, only two types of defence were brought to the attention of the jury by the judge, *viz.*, the exercise of the right of self-defence and whether there was grave and sudden provocation. The jury returned a majority verdict of guilty by 5 to 2. The appellant appealed.

Held: (1) a judge sitting with a jury must put to them any defence available on the evidence irrespective of whether or not reliance has been placed on that defence at the trial or whether or not it has been mentioned by the counsel at the trial. The way in which it is to be complied with is a matter for the trial judge to decide basing on the actual evidence adduced at the trial;

(2) in this case the trial judge's direction to the jury on the law relating to the right of private defence was sketchy and inadequate as to enable them to fully understand the law and appreciate the principles relating to self-defence. He also did not explain Exception 2 of section 300 of the Penal Code. This non-direction was fatal to the defence case on the ground that the jury being laymen were not made aware of the legal principle that while the proper exercise of self-defence by the accused in causing the death of the attacker does not amount to any criminal offence, the exercise of such right in excess of the power given by the law which results in the death of the opponent does not amount to murder if exercised in good faith and under the circumstances stated in the Exception but amounts to culpable homicide not amounting to murder. There was a failure to direct the jury on an essential point and the non-direction has occasioned a failure of justice;

(3) in this case it was the duty of the trial judge to have invited the attention of the jury to Exception 4 to section 300 of the Penal Code and explain to them the principle applicable thereto. In Exception 4 notwithstanding that a blow has been struck or provocation given in the origin of the dispute, it is the subsequent conduct of the parties which puts them upon equal footing in respect of guilt that is material. It should then be left to the jury to consider

whether the appellant had taken an undue advantage or acted in a cruel or unusual manner;

(4) the conviction for murder must be quashed and a finding of guilt and conviction of culpable homicide not amounting to murder substituted under the first limb of section 304 of the Penal Code.

Case referred to:

(1) *Loo Geok Hong* v. *Public Prosecutor* [1961] M.L.J. 157, 158.

SUPREME COURT.

Paramjit Singh for the appellant.

Miss Su Geok Yiam (Deputy Public Prosecutor) for the respondent.

Cur. Adv. Vult.

Syed Agil Barakbah S.C.J. (delivering the Judgment of the Court): The appellant was convicted at the Ipoh Assizes for murder in contravention of Section 302 of the Penal Code. The jury returned a majority verdict of guilty by 5 to 2. The charge against him was that on July 20, 1978 at about 7.00 a.m. at an unnumbered house, Batu 13 Segari, in the District of Dindings, Perak, he murdered one Beah Seai Chia, the wife of his employer. The case has a history of a misunderstanding between the husband of the deceased Lai Kuan Chuei (P.W.4) and the appellant relating to the intended sale of one of the two boats belonging to P.W.4 which the appellant had been using for fishing at sea on a profit-sharing basis between the two. P.W.4 wanted to dispose of the boat because the business was running at a loss. The appellant wanted compensation from P.W.4, because he would be deprived of his job. An argument arose about two days before the incident at P.W.4's house when the appellant came with his employee to see P.W.4 relating to the above. At the time of the incident, P.W.4 was out at sea. Only two people knew about the incident apart from the deceased, *viz.*, the appellant and the son of P.W.4 and the deceased, Lai Hai Heng (P.W.17) who was about six years old when he witnessed the whole incident. There were two different versions as to the manner in which the killing took place, although there was no dispute as to the identity of the appellant as the man who killed the deceased. The learned Judge rightly directed the Jury on the principles of law relating to the testimony of a child and the requirement of corroboration by independent evidence. He also touched on the cautioned statement of the appellant which was admitted as evidence for the prosecution. He brought to the attention of the Jury the cardinal principle of law that where several facts disclosed by the prosecution contradict one another, the facts more favourable to the accused should be accepted. In other words, he brought home to the Jury that the statement of the appellant was to be accepted. Up to that stage, the summing-up, in our considered judgment, was well presented, the learned Judge having touched on the facts adequately. Nevertheless, the conviction was attacked in that the summing-up was defective on several grounds. In our view, the crucial ground was whether the learned Judge had adequately directed the Jury on the alternative verdict of culpable homicide not amounting to murder. In discussing the defence, the Judge said, *inter alia,* on page 104 of the Record:

"As I understand the whole defence, if it is an accident of (or?) private defence, then you must return a verdict of not guilty. If it is grave and sudden provocation, then you reduce the charge to culpable homicide not amounting to murder."

Further on page 105, he continued:

"Subject to what I have already said, there are three possible verdicts in this case. The first verdict is guilty of murder. If you are satisfied beyond all reasonable doubt that the accused slashed the deceased with the intention of causing her death and the defence has raised no doubt, then you must return a verdict of guilty of murder. The second verdict is a verdict of not guilty. You will return this verdict if you find that the wounds were inflicted in self-defence. The third verdict is that if you find that the defence has raised grave and sudden provocation, then you reduce your finding to one of guilty of culpable homicide not amounting to murder. And you do this, members of the jury, by having regard to the evidence that was adduced in this Court and treating the evidence on a reasonable basis and relevant basis."

It is clear that only two types of defence were brought to the Jury's attention, *viz.*, the exercise of the right of self-defence (private defence) and whether there was grave and sudden provocation which is Exception 1 to section 300 of the Penal Code.

It was submitted that the Jury had the advantage of considering only two alternatives and other relevant exceptions to section 300, in particular Exception 4, were not brought to their attention.

Now, it is the general principle of law for a Judge sitting with a Jury to put to them any defence available on the evidence irrespective of whether or not reliance has been placed on that defence at the trial or whether or not it has been mentioned by the counsel at the trial. The way in which it is to be complied with is a matter for the trial Judge to decide basing on the actual evidence

adduced at the trial (see *Loo Geok Hong* v. *Public Prosecutor*[1]). By available defence, it does not mean each and every defence that is mentioned in the Penal Code but possible defences arising from the evidence that become necessary in the circumstances to be put to the Jury in order to enable them to reach a proper and just verdict.

On perusal of the summing-up, we are of the view that the trial Judge's direction to the Jury on the law relating to the exercise of the private defence by the appellant was sketchy and inadequate as to enable them to fully understand the law and appreciate the principles relating to self-defence. He also did not explain Exception 2 of section 300 of the Penal Code which states:

"Culpable homicide is not murder if the offender, in the exercise in good faith of the right of private defence of person or property, exceeds the power given to him by law, and causes the death of the person against whom he is exercising such right of defence, without premeditation and without any intention of doing more harm than is necessary for the purpose of such defence."

This non-direction is fatal to the defence case on the ground that the Jury being laymen were not made aware of the legal principle that while the proper exercise of self-defence by the accused in causing the death of the attacker does not amount to any criminal offence, the exercise of such right in excess of the power given by law which results in the death of the opponent does not amount to murder if exercised in good faith and under the circumstances stated in the Exception but amounts to culpable homicide not amounting to murder. That, in our view, was a possible defence which had arisen at the trial and should have been directed to the Jury.

The main complaint, however, is the absence of Exception 4 of section 300 of the Penal Code in the summing-up. Exception 4 states:

"Culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel, and without the offender having taken undue advantage or acted in a cruel or unusual manner.

Explanation – It is immaterial in such cases which party offers the provocation or commits the first assault."

It is to be noted that this Exception sometimes overlaps that of grave and sudden provocation in Exception 1 which the trial Judge had brought to the attention of the Jury. However, when considering the defence evidence as corroborated by the cautioned statement of the appellant, we are of the view that it became the duty of the trial Judge to have invited the attention of the Jury to that Exception as well and explain to them the principle applicable thereto. The defence evidence showed that when the appellant asked for a loan of money from the deceased she refused, scolded and chased the appellant, hitting him with a broom and then throwing a knife at him. The knife missed him and fell to the ground. Both went for the knife but the appellant gained possession of it and slashed her. When she fell down on the ground, he picked a stone and hit her on the head. There is a distinction between the two exceptions. In Exception 1, there must be a grave and sudden provocation sufficient to deprive the accused of the power of self-control when he killed the person who gave the provocation; in Exception 4, notwithstanding that a blow has been struck or provocation given in the origin of the dispute, it is the subsequent conduct of both parties which puts them upon equal footing in respect of guilt, that is material. It should then be left to the Jury to consider whether the appellant had taken an undue advantage or acted in a cruel or unusual manner.

We are of the opinion that there is a failure to direct the Jury on that essential point and the non-direction has occasioned a failure of justice.

For these reasons, we allowed the appeal, quashed the conviction of the appellant for murder and set aside the death sentence under section 302 of the Penal Code. In lieu thereof we substituted the finding of guilt and conviction of culpable homicide not amounting to murder under the first limb of section 304 of the Penal Code and passed the sentence of fifteen years' imprisonment with effect from the date of arrest.

Appeal allowed.

Solicitors: *Paramjit & Co.*